88-6

Supreme Court, U.S.
FILED
MAY 31 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

SCOTT B. CORR, PATRICIA CORR
AND GEORGE CORR, Petitioners

v.

SAMUEL A. HINDS, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

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TO

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QUESTIONS PRESENTED

I. Did the court below violate the Petitioners' rights to due process, including taking property with due process, by vacating an attachment upon the respondent's property as a sanction for failing to provide discovery in the absence of any written notice in the motion or supporting documents that vacating the attachment was a form of relief sought by the respondent?

II. Did the court below violate the Petitioners' rights to due process in dissolving the petitioners' attachment upon the respondent's property as a sanction for failing to provide discovery in the absence of any finding that the petitioners had failed to produce all documents in their possession or control, or had acted in bad faith or had failed to comply with a previously entered order compelling such discovery?

TABLE OF CONTENTS

Questions Presented 1

Table of Contents 3

Table of Authorities 5

Prayer for Relief 7

Opinion Below 8

Jurisdiction 9

Constitutional and Statutory Provisions Involved 9

Statement of Case 10

Reasons for Granting the Writ 15

1. In the present case the Respondent's motion for dissolution of the attachment was made orally and without notice as required by the rules and thus granting the motion, even as a sanction on the motion to compel, without notice and opportunity for meaningful hearing deprived the petitioners of their constitutional rights to due process. 15

2. In the absence of a finding that the petitioners had actually failed to produce documents in their possession or control, had acted in bad faith or had failed to comply with a previously entered order of the court, the sanction of depriving the petitioners of their attachment, a sanction unrelated to the discovery which the petitioners had allegedly failed to provide, was an unreasonable one which deprived the petitioners of an opportunity to obtain a meaningful judgment on the merits all in violation of their due process rights. 20

Conclusion 23

Certificate of Service 25

Appendix 31

TABLE OF AUTHORITIES

Authority	Page
Countryside Cas. Co. v. Orr, 523 F.2d 870 (8th Cir. 1975)	16
Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 72 L.Ed. 492, 102 S.Ct. 2099 (1982)	19,20
Jadwin v.Dayton, 379 N. W. 2d 194 (Minn. App. 1985),	17
M.E.N. Co. v. Control Fluidics, 834 F.2d 869 (10th Cir. 1987)	21
Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 77 L.Ed. 2d 180, 103 S.Ct 2706 (1983)	17
Nat. Hockey League v. Metro Hockey Club, 472 U.S. 639, 49 L.Ed.2d 474, 96 S.Ct. 2778 (1976)	20
Parrott v. Taylor, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct 1908 (1981)	16
St. Paul Fire & Marine Cas. Co. v. Continental Casualty Co., 684 F.2d 691 (10th Cir. 1982)	17

Authority	Page
Societe Internationale v. Rogers, 357 U.S. 197, 2 L.Ed. 2d 1255, 78 S.Ct. 1087 (1958)	19,21
State v. Hinds, 485 A.2d 231 (Me. 1985)	10
Times Pub. Co. v. Burke, 375 So. 2d 297 (1979, Fla App Div. 2 1979)	18
Valley Line Co. v. Ryan, 771 F.2d 366 (8th Cir. 1985)	17
Wolgin v. Smith, 722 F.2d 389 (8th Cir. 1984)	17
Rule 4A, Maine Rules of Civil Procedure	9,18
Rule 4B, Maine Rules of Civil Procedure	9,18
Rule 6, Maine Rules of Civil Procedure	9,18
Rule 7, Maine Rules of Civil Procedure	9,18
Rule 37, Maine Rules of Civil Procedure	9,12,15,19

IN THE SUPREME COURT OF THE UNITED STATES

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SCOTT B. CORR, PATRICIA CORR
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v.

SAMUEL A. HINDS, Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE MAINE SUPREME JUDICIAL COURT

PRAYER FOR RELIEF

The petitioners, Scott B. Corr, Patricia Corr and George Corr, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Maine Supreme Judicial Court, entered in the above-entitled proceeding on February 17, 1988.

OPINION BELOW

The opinion of the Supreme Judicial Court of Maine, sitting as the Law Court in Scott B. Corr, et al., v. Samuel A. Hinds dated February 9, 1988, is reprinted in the Appendix hereto, App. 13, infra, and is Decision No. 4649, Law Docket No. CUM-87-341. The opinion is reported at 536 A.2d 1130 (Me. 1988). A timely motion for reconsideration was submitted which was denied by the court on March 2, 1988, the order of denial being effective under the Maine rules upon its entry upon the docket on March 3, 1988. As a result, the court's mandate (prepared February 5, 1988 in anticipation of the February 9, 1988 opinion) was then docketed on March 3, 1988. The order denying reconsideration and the mandate are included in the appendix at pages App. 25 and App. 27, respectively, infra.

JURISDICTION

The judgment of the Supreme Judicial Court of Maine, sitting as the Law Court in this matter issued February 9, 1988. It was stayed by operation of the Maine rule which allows aggrieved parties a period for filing motions for reconsideration. The petitioners, Appellants below, filed a timely motion for reconsideration which was denied effective March 3, 1988 and the mandate released and docketed on that same date and this petition for certiorari was filed by mailing within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves Amendment 14 to the United States Constitution, specifically the Due Process Clause, together with Rules 4A, 4B, 6, 7 and 37 of the Maine Rules of Civil Procedure.

STATEMENT OF THE CASE

This case involves claims by Scott Corr, then a minor, and his parents for damages against respondent Samuel Hinds, a former county commissioner, stemming from an incident of sexual abuse for which Hinds has been criminally convicted and his conviction affirmed on appeal, State v. Hinds, 485 A.2d 231 (Me. 1985).

Subsequently petitioners brought the present action in the Superior Court in the State of Maine seeking money damages for negligence and intentional infliction of emotional distress. After Hinds initially refused to comply with an order by the court to answer questions when first deposed, the petitioners obtained an order of attachment and trustee process on assets remaining in Maine and were fortunate enough to thereby encumber assets in the approximate amount of $30,000.00. As reflected in his subsequent deposition respondent has put his other assets beyond the reach of the petitioners by

secreting them in California or elsewhere and refuses to disclose their location.

After the litigation had proceeded for several years and the deposition of plaintiff Scott Corr had been taken in West Berlin at great expense and inconvenience to petitioners and their counsel (who also took to the deposition documents requested by the respondent for production but which the respondent did not attempt to request at the deposition as the transcript thereof reflects) the respondent made a motion to compel a response to his request for production of documents. (The specific language of the motion to compel production of documents seeking relief was "that this Court order [petitioners] to respond to its Request For Production of Documents immediately, and for appropriate sanctions, including attorneys' fees incurred for the bringing of this Motion, as well as other sanctions as this Court deems appropriate".) At hearing, without any prior written notice,

the Respondent's counsel sought to dissolve the petitioners attachment as a part of his request for relief as sanctions on his previously submitted written motion to compel.

The only possible source of authority for the court's order dissolving the petitioners' attachment as a sanction upon such motion was the power granted to the court to "make such orders in regard to the failure as are just" pursuant to Rule 37(b)(2), Maine Rules of Civil Procedure, (identical to the same section of the federal rule). In the present case the trial court held that in addition to an order for attorneys fees and despite prior production of documents sought together with collection of a variety of the documents and then transporting them to West Germany for the purpose of having them available at the deposition of Plaintiff Scott Corr, only to have the respondent make no inquiry as to the documents at that time, the respondent was entitled not only to an order specifically provided for by the terms of Rule 37(b)(2)

compelling further response on pain of dismissal, but was also separately and additionally entitled to have the court dissolve the petitioners' attachment upon the respondent's remaining property in Maine without any prior written notice that such relief was sought.

The Petitioners then sought appellate review by the Maine Supreme Judicial court under the collateral order doctrine. The appeal was heard in January of 1988 at which time both the specific issue of deprivation of the petitioners constitutional rights to notice and meaningful hearing and the related issue of the impropriety of the court's imposition of a severe, non-discovery related, sanction which effectively deprives the petitioners of their day in court were argued. The court decided both issues upon the merits, holding the lack of notice was not a denial of due process and that imposition of the severe sanction was permissable.

This matter is before the Court upon

petitioners' petition for certiorari to the Maine Supreme Judicial court, from its order affirming the action of the trial court in vacating the attachment as a sanction upon the motion to compel. This petition is brought pursuant to 28 U.S.C. §1257(3).

REASONS FOR GRANTING THE WRIT

1. The court below violated the Petitioners' rights to due process in the form of notice and a meaningful hearing by dissolving the petitioners' attachment upon the respondent's property as a sanction for failing to provide discovery in the absence of any written notice in the motion to compel or supporting documents that vacating the attachment was a form of relief sought by the respondent. This decision is in conflict with decision of both Federal Courts of Appeal and state courts of last resort.

The present case involves the language of Rule 37. The Maine version of the rule is identical to the federal version which has been interpreted by both this Court and the lower federal courts. While it might be argued that the some of the sanctions authorized by the specific language of the rule have a potentially greater adverse effect upon the petitioners (exclusion of evidence, or dismissal, for example) such an argument is not relevant here. The sole issue presented here is whether the order below was a proper exercise of the court's power. In light of existing federal precedent that a court upon a rule 37 motion cannot impose

sanctions not authorized by Rule 37, Countryside Cas. Co. v. Orr, 523 F.2d 870 (8th Cir. 1975) the order vacating the attachment cannot be brought within the power of the Superior Court through the back door merely by raising the argument in the guise of a motion to compel rather than a motion to dissolve the attachment. Both the Maine and federal cases interpreting the rules make it very clear that the court is to be guided by the substance of the motion and not by the label.

The mere fact that in this case the respondent's counsel requested dissolution of the attachment as a sanction under Rule 37 rather than correctly labeling it as a motion to dissolve the attachment does not alter the scope of the court's power to grant such relief without notice to the petitioners. The courts have routinely held that the major elements of due process are notice and an opportunity for a meaningful hearing. Parrott v. Taylor, 451 U.S. 527, 68 L.Ed. 2d 420, 101 S.Ct. 198 (1981);

Mennonite Board of Missions v. Adams, 462 U.S. 791, 77 L.Ed.2d 180, 103 S.Ct. 2706 (1983). Such rights are violated when, as here, there is no written notice that relief not sought in the motion will be requested. Although this issue does not ordinarily arise in federal civil case since there is a specific provision in the federal rules requiring specification of the relief sought, the federal courts have routinely required that the relief requested be stated. Wolgin v. Smith, 722 F.2d 389 (8th Cir. 1984); St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co., 684 F.2d 691 (10th Cir. 1982). State courts, however, have also required such notice since due process clearly demands it. Jadwin v. Dayton, 379 N. W. 2d 194 (Minn. App. 1985). Dealing with the issue in a constitutional context the federal courts have held that lack of notice of an issue violated due process. Valley Line Co. v. Ryan, 771 F.2d 366 (8th Cir. 1985). Mere presence at a hearing does not itself constitute due process.

Times Pub. Co. v. Burke, 375 So. 2d 297 (Fla. App. Div. 2 1979). It was thus improper for the court below to enter the order dissolving the attachment when the notice given to the petitioners by the written motion filed by the Respondent's counsel contained no reference to dissolution of the attachment and was merely notice of a motion to compel production.

Rules 4A, 4B, 6 and 7 of the Maine Rules of Civil Procedure work in combination to prescribe the procedures relating to attachments. Rules 4A(g) and 4B(h) both provide that when attachment and trustee process are obtained ex parte, as in this case, a minimum of two days' notice is required for a subsequent motion to dissolve the attachment. Rule 7(b) provides that the motion be in writing and 6(d) provides that the motion shall be accompanied by written notice thereof not later than 7 days before the time specified for the hearing except where the notice period is shortened, as here, by another rule or an order. (It

is an undecided question in Maine whether a denial of an initial motion to dissolve an ex parte attachment, as here, requires that later motions such as the present one be upon a minimum of seven days notice.) In the present case, the respondent's motion to compel made no reference whatsoever to any request to dissolve the attachment. That relief was sought orally at the hearing on the motion to compel. The petitioners lacked adequate notice of this "application to the court for an order" dissolving the attachment since it was not in writing and was without even the minimum notice allowed by the rules. Under these circumstances ranting the motion was an abuse of the court's power which is circumscribed by due process even when acting upon Rule 37 motions. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701-706, 72 L.Ed. 492, 500-504, 102 S.Ct. 2099, 2103-2106 (1982)); Societe Internationale v. Rogers, 357 U.S. 197, 2 L.Ed. 2d 1255, 78 S.Ct. 1087 (1958).

2. In the absence of a finding of actual failure to produce the requested documents, bad faith or failure to comply with a previously entered order of the court, imposition of the sanction of depriving the petitioners of their attachment, a sanction unrelated to the discovery which the petitioners had allegedly failed to provide, was an unreasonable one which deprived the petitioners of their opportunity of obtain a meaningful judgment on the merits of their claim and deprived them of due process.

The general rule is that absent a finding that failure to comply with discovery deadlines was not caused by inability or was intentional, willful or action taken in bad faith, severe sanctions which are unrelated to the discovery which is in dispute, such as the sanction imposed in the present case are unjustified. See e.g. Nat. Hockey League v. Metro. Hockey Club, 427 U.S. 639, 49 L.Ed.2d 474, 96 S.Ct. 2778 (1976) where this court upheld a dismissal under Rule 37 only after repeated conferences and warnings to the offending party (unlike the present case where the only documents then known the Petitioners had been provided) and Insurance Corp. of Ireland v. Compagnie des Bauxites de

Guinee, supra, where the Court in approving the sanction specifically noted that it was narrowly drawn and related only to the issue upon which discovery was sought and intentionally withheld. See also Societe Internationale v. Rogers, supra; M.E.N. Co. v. Control Fluidics, 834 F.2d 869 (10th Cir. 1987).

In the present case the petitioners had, in fact supplied documents. This is not a situation where a party willfully or in bad faith concealed or refused to produce documents in its possession or control. Under all the circumstances of this case depriving the petitioners of their attachment which merely guarantees the availability of some small amount of assets (approximately $30,000.00) against a respondent who has sold all his other assets in Maine, removed himself to the State of California, has failed to comply with previous orders of the Superior Court to pay costs and to disclose information to the petitioners and whose insurer has refused to agree to indemnify the respondent

in the event of a judgment in favor of the petitioners because of the horrendous and allegedly intentional nature of the respondent's acts, is not appropriate.

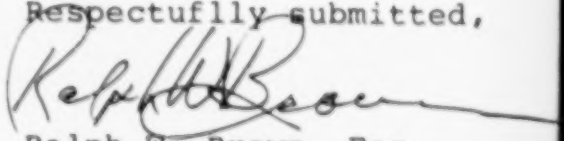
Under the circumstances of the present case, lifting the attachment is in effect equivalent to dismissal of the petitioner's complaint in that it effectively deprives the petitioners of any hope of recovery even if the case is satisfactorily tried to a conclusion.

CONCLUSION

For the reasons set forth above the petitioners respectfully pray that the Court issue a writ of certiorari to review the decision of the Maine Supreme Judicial Court.

Dated: May 31, 1988

Respectfully submitted,



Ralph W. Brown, Esq.

CERTIFICATE OF SERVICE

I, F. Mark Terison, Esquire, being first duly sworn, hereby depose and say that:

1. I am a member of the Bar of this Court and was a member of the Bar of this Court on May 31, 1988.

2. I have been informed by Ralph W. Brown, Esquire, and, therefore, believe that forty (40) copies of the foregoing Petition for Writ of Certiorari in the matter of Scott B. Corr, et al. v. Samuel A. Hinds, an action now pending in the Superior Court for the County of Cumberland and State of Maine, were filed with the Clerk of this Court by depositing said forty (40) copies of said Petition at the United States Postal Service post office at Portland, Maine, on May 31, 1988, first class (priority mail) postage prepaid, addressed Joseph F. Spaniol, Jr., Clerk, United States Supreme Court, Washington, D.C. 20543.

3. I have been informed by Ralph W. Brown, Esquire, and, therefore, believe that three

(3) copies of the foregoing Petition for Writ of Certiorari in the matter of Scott B. Corr, et al. v. Samuel A. Hinds, an action now pending in the Superior Court for the County of Cumberland and State of Maine, were served upon Mark E. Dunlap, Esquire, attorney for the respondent, by depositing said three (3) copies of said Petition at the United States Postal Service post office at Portland, Maine, on May 31, 1988, first class (priority mail) postage prepaid, addressed to him at his office at 408 Fore Street, Post Office Box 370, Portland, Maine 04112.

4. Further, I have been informed by said Ralph W. Brown, Esquire, and, therefore, believe that he was not a member of the Bar of this Court on May 31, 1988 and, therefore, cannot himself make this affidavit concerning the mailing of said Petition, but that he had before then submitted his application for admission to the Bar of this Court and was subsequently admitted on June 13, 1988.

Dated: June 28, 1988

F. Mark Terison

STATE OF MAINE
CUMBERLAND, SS.

June 28, 1988

Then personally appeared before me the above-named F. Mark Terison, a person known to me, who made oath that the matters set forth in the foregoing Certificate were true based upon his personal knownledge or upon information and belief, and insofar as based upon information and belief, based upon information which he believed to be true.

MY COMMISSION EX
OCTOBER 2, 19

CERTIFICATE OF SERVICE

I, Ralph W. Brown, Esquire, being first duly sworn, hereby depose and say that:

1. I am a member of the Bar of this Court.

2. I have this day filed forty (40) copies of the foregoing Petition for Writ of Certiorari in the matter of Scott B. Corr, et al. v. Samuel A. Hinds, now pending in the Superior Court for the County of Cumberland and State of Maine, by depositing said forty (40) copies of the foregoing Petition at the United States Postal Service post office at Portland, Maine, first class (priority mail) postage prepaid, addressed Joseph F. Spaniol, Jr., Clerk, United States Supreme Court, Washington, D.C. 20543.

3. I have served three (3) copies of the foregoing Petition for Writ of Certiorari in the matter of Scott B. Corr, et al. v. Samuel A. Hinds, now pending in the Superior Court for the County of Cumberland and State of Maine, upon Mark E. Dunlap, Esquire,

attorney for the respondent, by depositing said three (3) copies of the foregoing Petition at the United States Postal Service post office at Portland, Maine, first class (priority mail) postage prepaid, addressed to him at his office at Post Office Box 370, Portland, Maine 04112.

4. I further Certify that all parties required to be served have been served.

Dated: June 28, 1988

Ralph W. Brown

STATE OF MAINE
CUMBERLAND, SS.

June 28, 1988

Then personally appeared before me the above-named Ralph W. Brown, a person known to me, who made oath that the matters set forth in the foregoing Certificate were true based upon his personal knownledge.

MY COMMISSION EXPIRES
OCTOBER 2, 19[illegible]

CONTENTS OF APPENDIX

Transcript of motion hearing	1
Motion with order thereon	9
Opinion of the Maine Supreme Judicial Court in Corr v. Hinds	13
Order on reconsideration	25
Mandate	26
Rule 4A, Maine Rules of Civil Procedure	27
Rule 4B, Maine Rules of Civil Procedure	29
Rule 6, Maine Rules of Civil Procedure	32
Rule 7, Maine Rules of Civil Procedure	34
Rule 37, Maine Rules of Civil Procedure	35
Fourteenth Amendment to the United States Constitution	38

CUMBERLAND COUNTY
CV 85-76
SUPERIOR COURT, SS.

SCOTT B. CORR,

Plaintiff,

V.

SAMUEL A. HINDS,

Defendant.

APPEARING BEFORE:

THE HONORABLE JUSTICE
DONALD G. ALEXANDER
PRESIDING JUSTICE

CUMBERLAND COUNTY COURTHOUSE
PORTLAND, MAINE
AUGUST 7, 1987

APPEARANCES:

For the Plaintiff:
RALPH W. BROWN, ESQ.

For the Defendant:
MARK DUNLAP, ESQ.

ELIZABETH O'KANE HARVEY
OFFICIAL COURT REPORTER

THE COURT: First we have 85-76, Corr versus Hinds, a motion to compel and for sanctions.

MR. DUNLAP: Good morning, Your Honor. The motion to compel I think is relatively self-explanatory.

The request had been outstanding for approximately a year and three months.

THE COURT: No official response yet?

MR. DUNLAP: No official response yet, although I did this morning get a response which is still incomplete.

In talking to Mr. Brown he is still not willing to tell me that it is complete for the purposes of closing out on this case, but I wonder if I might be heard for just a moment on the issue of sanctions.

Your Honor, there have been a couple of three motions to compel in this case. The original discovery deadline was June 16, 1986, in this matter. The Plaintiff's counsel had been under orders to file an amended -- to file a report of conference of counsel. Since June 16, 1986 that was not done.

A week or so ago under threat of the case being dismissed with prejudice, all of this has, as the Court well knows, kept the case from coming on the trial list, and my client is in financial straights. And there has been an attachment order outstanding in this case. It has tied up a substantial number of his assets.

As a sanction I would ask the Court to consider lifting that order and allowing him to -- to the return of the monies that are currently in the account that the attorneys are signatories on.

THE COURT: Okay. Response.

MR. BROWN: Your Honor, we have from time to time produced documents. We have answered interrogatories, been to a deposition in New York and in Berlin, Germany.

Granted we have not had a formal response to the request for production of documents. We have provided the documents. We're willing to stipulate that and we have, in fact, given Mr. Dunlap everything that we have.

We carted all of this material, except for a few pages of notes that we got from Community Counseling within the last month or so to Berlin for that deposition. The material was available but not requested at that time.

I realize that there are problems here. However, we have made an effort to correct them. As I said, we have given Mr. Dunlap everything we had. We're prepared to stipulate -- have stipulated in our response we have given everything we have.

THE COURT: Still you haven't provided what's been requested or no objection to it as such?

Obviously, now the time for objections has passed. They are waived.

MR. BROWN: Except to say we don't -- it doesn't exist.

THE COURT: Then you can provide a formal response.

MR. BROWN: That has been done.

THE COURT: I thought it had not according to Mr. Dunlap's representation.

MR. BROWN: Mr. Dunlap has indicated he got a response this morning. He represents the response is incomplete. Our response recites that we have provided a lot of documents.

We have documents that have been obtained since then, documents that have been previously produced, provided or made available are attached to that response.

I have indicated everything we have now is there, and indicated that if we subsequently locate or obtain other documents we will provide them also.

There is supposed to be a file in the hands of the Plaintiff's former attorney, which we have been trying to obtain for well over two years now. The firm with which the original attorney was a part has been reformed several times since then. Even when we started looking for these things that attorney had left.

THE COURT: Who is that?

MR. BROWN: Michael Cantara was then in the district attorney's office in York

County, I believe. I had recently again spoken to the attorneys involved and nobody seems to know where that file is, notwithstanding the fact there were telephone calls, an exchange of correspondence two years ago. I was promised that the file would be provided and it has yet to appear.

That file we don't believe contains anything that we don't have, other than whatever notes the attorney provided, except for a document that has been characterized as a diary prepared by the Plaintiff, Patricia Corr, while all of this business was going on.

Nobody knows where that diary is or whether or not it exists. That's the only document we know of that did exist at one point in time, which we would like to have. We don't have it.

THE COURT: Okay. Anything else, Mr. Dunlap?

MR. DUNLAP: I would like to point out even a cursory look at this file would show that the Plaintiff's case has been going

on the margins of the rules the whole way through.

I was only able to get discovery essentially under threats of sanctions from this Court all the way through, and I think that the sanctions that I have asked for is although a little bit unusual, reasonable in this situation because it is -- it also ties up a continuing stream of income that Mr. Hinds would otherwise have, but for the attachment order and a stream of income which he is in great need of.

THE COURT: Okay. I have reviewed the matter and it seems to me that there been several problems in the past back and forth on discovery in terms of complying with the pretrial filing requirements, things like that. Therefore, some sanctions are appropriate.

Further, I would indicate that I think as the rules provide as the request for production of documents was not responsed to in a timely manner, objections to them are waived. There is an obligation to provide

complete responses. What I am going to do is order the motion to compel granted. The request for documents must be provided in full within 15 days or the action shall be dismissed, the Plaintiff to pay defense counsel $150 for the cost of bringing this motion, and the pending attachment is vacated in this matter.

MR. DUNLAP: Thank you, Your Honor.

(The motion was concluded.)

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT
Civil Action
Docket No. CV 85-76

SCOTT B. CORR, et al.,

Plaintiffs

v.

SAMUEL A. HINDS,

Defendant

MOTION TO COMPEL AND FOR SANCTIONS

NOW COMES the Defendant, Samuel A. Hinds, by and through his attorney, and moves that this honorable Court compel the Production of Documents requested by Defendant. Defendant states in support of this Motion that:

1. He originally made the Request for Production Of Documents on March 6, 1986. The deadline to respond was continued by agreement to May 9, 1986. Thereafter, the Request was reiterated by letter on September 26, 1986 and again at the deposition of Plaintiff Scott Corr in Germany in November of 1986.

2. To date, Defendant has received only sporadic documents and no official response

whatsoever to its Request for Production of Documents.

3. Moreover, the same Request for the production of the same documents was incorporated in the Notice of Depositions to each of the Plaintiffs, all of whose depositions have been taken but the response to the Request, as noted above, has not been forthcoming.

WHEREFORE, Defendant prays that this Court order Plaintiffs to respond to its Request for Production of Documents immediately, and for appropriate sanctions, including attorneys' fees incurred for bringing this Motion, as well as other sanctions as this Court deems appropriate.

DATED: May 18, 1987

/s/ Mark E. Dunlap
Mark E. Dunlap
Attorney for Defendant
Samuel Hinds

408 Fore Street
Portland, Maine 04112
Telephone: (207) 772-2834

8-7-87

After hearing, and based on the discussion on the record, the Court ORDERS:

1. Motion to compel granted. The requested documents to be provided in full within 15 days or this action shall be dismissed.

2. Plaintiff to pay defense counsel $150 or cost of bringing this motion.

3. The pending attachment is vacated.

/s/ D. Alexander

[Justice, Superior Ct.]

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 4649
Law Docket No. CUM-87-341

SCOTT B. CORR, et al.

v.

SAMUEL A. HINDS

Argued - January 8, 1988

Decided - February 9, 1988

Before McKUSICK, C.J., and NICHOLS, ROBERTS, WATHEN, GLASSMAN and SCOLNIK, JJ.

WATHEN, J.

Plaintiffs Scott Corr, George Corr, and Patricia Corr appeal from an order of the Superior Court (Cumberland County) dissolving an attachment as a sanction for their failure to comply with discovery. On appeal, plaintiffs claim error in the dissolution of the attachment on a variety of grounds. We affirm the order of the Superior Court.

The relevant procedural facts may be summarized as follows: Plaintiffs, Scott Corr and his parents, brought the underlying action on January 22, 1985, for damages arising out

of an incident of sexual abuse involving defendant and Scott Corr. Plaintiffs then obtained an ex parte order of attachment and trustee process against two promissory notes due to defendant from the sale of his real estate business in Maine. Discovery was fraught with delays from the beginning. On January 30, 1985, plaintiffs deposed defendant and, on the oral motion of plaintiffs, the Superior Court ordered defendant to respond to certain questions that he refused to answer and ordered defendant to pay plaintiffs' counsel the fees and costs incurred by virtue of his failure to go forward with the deposition. On August 5, 1985, the action was placed on the expedited pretrial list, requiring that discovery be completed by November 5, 1985. On motion of defendant, the Superior Court extended the discovery deadline to June 15, 1986.

On March 6, 1986, defendant served interrogatories and requests for production of documents on plaintiffs Scott Corr, George

Corr, and Patricia Corr and on March 27, 1986, defendant filed notices to take their oral depositions.[1] Defendant agreed to extend the deadline for responding to the interrogatories and to the requests for production of documents to May 9, 1986. When plaintiffs had failed to respond by May 20, 1986, however, defendant filed a motion to compel discovery. On the morning of the hearing on defendant's motion, plaintiffs George and Patricia Corr served defendant with their answers to interrogatories, as well as certain documents, and no action was taken on the motion to compel. Plaintiff Scott Corr did not serve his answers to interrogatories until the day of his deposition in November, 1986. None of the plaintiffs served written response to defendant's request for production as required by M.R. Civ. P. 34(b).

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1. Defendant took the oral depositions of plaintiffs George and Patricia Corr in New York in April, 1986. After receiving an extension of the discovery deadline, defendant took the deposition of plaintiff Scott Corr in November, 1986, in Germany, where Corr was stationed.

On May 13, 1987, defendant brought a second motion to compel and a request for sanctions, stating that as of May 18, 1987, defendant had received only sporadic documents and no written response to his requests for production.[2] A hearing on the second motion was held on August 7, 1987. On that date, plaintiffs filed a partial response to the request for production and stated that they had produced all discoverable documents in their possession.[3] Noting that no objections had ever been filed to defendant's request, the Superior Court ordered the production of all the documents requested. As a sanction for plaintiffs' failure to file a written response in a timely manner, the Superior Court ordered

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2. On July 14, 1987, unrelated to defendant's motion to compel, the Superior Court ordered plaintiffs to file the report of conference of counsel within 10 days or the case would be dismissed. The report was filed on July 29, 1987.

3. On August 24, 1987, each plaintiff filed a separate formal response to defendant's request for production, again essentially stating that all documents known to exist were attached.

the dissolution of the attachment. It is from this order that plaintiffs appeal.

We note preliminarily that we review pretrial discovery orders only for an abuse of discretion. Pattershall v. Jenness, 485 A.2d 980, 985 (Me. 1984). The Superior Court is given broad discretionary powers to impose sanctions for failure to comply with discovery orders and requests. Ireland v. Galen, 401 A.2d 1002, 1004 (Me. 1979).

Plaintiffs first contend that M.R. Civ. P. 4A governing attachment supersedes M.R. Civ. P. 37 governing sanctions for failure to make discovery and that the requirements of Rule 4A were not met.[4] Rule 4A, however, does not limit the means for obtaining dissolution. In pertinent part M.R. Civ. P. 4A provides:

> (g) **Dissolution or Modification of Ex Parte Attachments.** On 2 days' notice to the plaintiff or on such

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4. Because this case also involves trustee process, M.R. Civ. P. 4B is also applicable. For purposes of this case, however, both Rule 4A and Rule 4B contain the same requirements and the same language. Therefore, we refer only to the language of Rule 4A.

> shorter notice as the court may prescribe, any person having an interest in property that has been attached pursuant to an ex parte order entered under subdivision (f) of this rule may appear, without thereby submitting to the personal jurisdiction of the court, and move the dissolution or modification of the attachment. ... Nothing herein shall be construed to abolish or limit any means for obtaining dissolution, modification or discharge of an attachment that is otherwise available by law.

(emphasis added). Rule 37 is another means for obtaining dissolution, for it provides that:

> (d) **Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.** If a party... fails... (3) to serve a written response to a request for production or inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. ...
>
> The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(emphasis added).

The Superior Court's basis for dissolving the attachment pursuant to Rule 37 is its discretion to make such orders as are just. Among other sanctions permissible under Rule 37(d) is the authority to dismiss the action or any part thereof. M.R. Civ. P. 37 (b)(2)(C). The greater sanction of dismissal includes the lesser sanction of dissolving an attachment order. Because Rule 37 controls, plaintiffs' arguments concerning compliance with the requirements of Rule 4A are without merit.

Plaintiffs next contend that the Superior Court deprived them of their constitutional right of due process. Although they received notice of the hearing on defendant's motion for sanctions and were represented at that hearing, they argue that they were not afforded an opportunity to prepare for the sanction of dissolution because the notice did not alert them to the possibility that the attachment might be dissolved. First, plaintiffs failed to raise this objection at the hearing and therefore have not pre-

served the issue. Furthermore, we have stated previously that if a party has an opportunity to explain his noncompliance, which noncompliance is the focus of the hearing, he has not been deprived of his constitutional right of due process. Ireland v. Galen, 401 A.2d 1002, 1004-05 (Me. 1979) (District Court did not abuse its discretion in ordering a default judgment even though motion to compel sought lesser sanction). In this case, plaintiffs were notified of the hearing and were represented. No denial of due process has been demonstrated.

Plaintiffs further contend that, absent bad faith or failure to comply with a previously entered order of the court, the sanction of dissolving an attachment was an abuse of discretion. This argument is without merit. We held in Pelletier v. Pathiraia, 519 A.2d 187, 189 (Me. 1986), that a showing of willfulness, bad faith, or fault is not required to justify the Superior Court's decision to dismiss an action. Finally, plaintiffs take nothing

from their claim that they were not first given an opportunity to comply with an order before the sanction was imposed. The rule mandates that the "party upon whom the request is served shall serve a written response within 30 days... ." M.R. Civ. P. 34(b). The only literal limitation is the requirement that the exercise of discretion be "just."

Plaintiffs have ignored the difference between their obligation to respond to defendant's request for production and the obligation, if any, to supply documents. See Battryn v. Indian Oil Co., 472 A.2d 937, 941 (Me. 1984). Plaintiffs are obliged to serve a written response which "shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated." M.R. Civ. P 34(b) (emphasis added). By failing to serve formal written responses to defendant's requests, and any objections thereto, plaintiffs precluded defendant and the Superior

Court from promptly evaluating plaintiffs' oral representation that all available documents had been supplied. Without the written response envisioned by Rule 34(b), the Superior Court is unable to supervise discovery disputes effectively.

Beneath all of plaintiffs' arguments lies the simple fact that, in complete violation of the rules, more than one year passed before plaintiffs filed a written response to defendant's request, and even then the response was incomplete. A party has an obligation to respond promptly and fully to a request for two motions and to compel in order to obtain a response. Given the unjustified nature of plaintiffs' failure to respond, the Superior court did not abuse its discretion by imposing the sanction of dissolution.

Plaintiffs' remaining contentions are without merit and require no discussion.

The entry is:

Judgment affirmed.

All concurring.

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NOTICE: This opinion is subject to formal revision before publication in the Maine Reporter. Readers are requested to notify the Reporter of Decisions, Box 368, Portland, Me. 04112, of any typographical or other formal errors before the opinion goes to press.

STATE OF MAINE
CUMBERLAND, SS.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Docket No. Cum-87-341

SCOTT B. CORR, et al.]
]
vs.] ORDER
]
SAMUEL A. HINDS]

Upon motion of appellants for reconsideration,

It is ORDERED that the motion be, and it hereby is, DENIED. The mandate shall issue forthwith.

Dated this second day of March, 1988.

For the Court,

/s/ Vincent L. McKusick
Chief Justice

STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court

LAW COURT DOCKET NO. CUM-87-34

Scott B. Corr, et al.]
]
v.] MANDATE
]
Samuel A. Hinds]

The above-captioned cause having been brought before this Court, sitting as the Law Court, from the Superior Court in the County of Cumberland; and it having been heard and maturely considered;

IT IS ORDERED that the Clerk of the Law Court enter upon the Law Court Docket and certify to the Clerk of the Superior Court in the County of Cumberland, the following mandate therein:

Judgment affirmed.

Dated: February 5, 1988

For the Court,

/s/ James Chute
Clerk

/s/ Daniel E. Wathen
Justice

RULE 4A. ATTACHMENT

(a) Availability of Attachment. In any action under these rules, real estate, goods and chattels and other property may, in the manner and to the extent provided by law, but subject to the requirements of this rule, be attached and held to satisfy the judgment for damages and costs which the plaintiff may recover. Attachment under this rule shall not be available before judgment in any action against a consumer for a debt arising from a consumer credit transaction as defined by 9-A M.R.S.A. § 1.301(12).

(b) Writ of Attachment: Form. The writ of attachment shall bear the signature or facsimile signature of the clerk, be under the seal of the court, contain the name of the court, the names and residences of the parties and the date of the complaint, be directed to the sheriffs of the several counties or their deputies, and command them to attach the goods or estate of the defendant to the value of the amount of plaintiff's demand for judgment, together with a reasonable allowance for interest and costs, and to make due return of the writ with their doings thereon. The writ of attachment shall also state the name of the Superior Court Justice who entered the order approving attachment of property, if any, and the date thereof.

(c) Same: Service. The writ of attachment may be procured in blank from the clerk and shall be filled out by the plaintiff's attorney as provided in subdivision (b) of this rule. The plaintiff's attorney shall deliver to the officer making the attachment the original writ of attachment upon which to make his return and a copy thereof.

No property may be attached unless such attachment for a specified amount is approved by order of the court. Except as provided in subdivision (f) of this rule, the order of approval may be entered only after notice to the defendant and hearing and upon a finding by the court that there is a reasonable likelihood that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the attachment over and above the aggregate of any liability insurance, bond, or other security, and any property or credits attached by other writ of attachment or by trustee process shown by the defendant to be available to satisfy the judgment.

An attachment of property shall be sought by filing with the complaint a motion for approval of the attachment. The motion shall be supported by affidavit or affidavits meeting the requirements set forth in subdivision (h) of this rule. Except as provided in subdivision (f) of this rule, the motion and affidavit or affidavits with the notice of hearing thereon shall be served upon the defendant in the manner provided by Rule 4 at the same time the summons and complaint are served upon him, and the defendant shall also be served with a copy of the writ of attachment with the officer's endorsement thereon of the date or dates of execution of any attachment which has been approved ex parte as provided in subdivision (f) of this rule.

Any attachment shall be made within 30 days after the order approving the writ of attachment. When attachments are made subsequent to service of the summons and complaint upon the defendant, a copy of the writ of attachment with the officer's endorsement thereon of the date or dates of the attachments shall be promptly served upon the defendant in the manner provided by Rule 5.

(d) Attachment on Counterclaim, Cross-Claim or Third-Party Complaint. An attachment may be made by a party bringing a counterclaim, a cross-claim, or a third-party complaint in the same manner as upon an original claim.

(e) Subsequent or Additional Attachment. If no writ of attachment has issued, or if the time period prescribed in subdivision (c) of this rule for making attachments has expired, the court on motion may issue an order of approval for attachment of real estate, goods and chattels or other property. The provisions of subdivisions (c) and (f) of this rule apply to the motion and any attachment ordered thereunder, except that notice if appropriate shall be served upon the defendant in the manner provided in Rule 5.

(f) Ex Parte Hearings on Attachments. An order approving attachment of property for a specific amount may be entered ex parte only in an action commenced by filing the complaint with the court together with a motion for approval of the attachment as provided in subdivision (c) of this rule. Such order shall issue if the court finds that there is a reasonable likelihood that the plaintiff will recover judgment in an amount equal to or greater than the amount of the attachment over and above the aggregate of any insurance, bond, or other security, and any property or credits attached by other writ of attachment or by trustee process known or reasonably believed to be available to satisfy the judgment, and that either (i) there is a clear danger that the defendant if notified in advance of attachment of the property will remove it from the state or will conceal it or will otherwise make it unavailable to satisfy a judgment, or (ii) there is immediate danger that the defendant will damage or destroy the property to be attached. The motion for such ex parte order shall be accompanied by a certificate by the plaintiff's attorney of the amount of any insurance, bond, or other security, and any other attachment or trustee process which he knows or has reason to believe will be available to satisfy any judgment against the defendant in the action. The motion, in the filing of which the plaintiff's attorney shall be subject to the obligations of Rule 11, shall be supported by affidavit or affidavits meeting the requirements set forth in subdivision (h) of this rule.

(g) Dissolution or Modification of Ex Parte Attachments. On 2 days' notice to the plaintiff or on such shorter notice as the court may prescribe, any person having an interest in property that has been attached pursuant to an ex parte order entered under subdivision (f) of this rule may appear, without thereby submitting his person to the jurisdiction of the court, and move the dissolution or modification of the attachment, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. At such hearing the plaintiff shall have the burden of justifying any finding in the ex parte order that the moving party has challenged by affidavit. Nothing herein shall be construed to abolish or limit any means for obtaining dissolution, modification or discharge of an attachment that is otherwise available by law.

(h) Requirements for Affidavits. Affidavits required by this rule shall set forth specific facts sufficient to warrant the required findings and shall be upon the affiant's own knowledge, information or belief; and, so far as upon information and belief, shall state that he believes this information to be true.

[Amended effective February 1, 1969; January 1, 1973; August 1, 1973; April 15, 1975; September 1, 1980; August 7, 1981.]

RULE 4B. TRUSTEE PROCESS

(a) Availability of Trustee Process. In any personal action under these rules except actions only for specific recovery of goods and chattels, for malicious prosecution, for slander by writing or speaking, or for assault and battery, trustee process may be used, in the manner and to the extent provided by law, but subject to the requirements of this rule, for the purpose of securing satisfaction of the judgment for damages and costs which the plaintiff may recover, provided, however, that no person shall be adjudged trustee for any amount due from him to the defendant for earnings. The term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commissions, bonuses or otherwise, and includes periodic payments pursuant to a pension or retirement program. Trustee process under this rule shall not be available before judgment in any action against a consumer for a debt arising from a consumer credit transaction as defined by 9-A M.R.S.A. § 1.301(12).

(b) Summons to Trustee: Form. The summons to a trustee shall bear the signature or facsimile signature of the clerk, be under the seal of the court and contain the name of the court and the names of the parties, be directed to the trustee, state the name and address of the plaintiff's attorney, the amount for which the goods or credits of the defendant are attached on trustee process, and the time within which these rules require the trustee to make disclosure, and shall notify him

that in case of his failure to do so he will be defaulted and adjudged trustee as alleged. The trustee summons shall also state the name of the Superior Court Justice who entered the order approving attachment on trustee process and the date thereof.

(c) **Same: Service.** The trustee summons may be procured in blank from the clerk and shall be filled out by the plaintiff's attorney as provided in subdivision (b) of this rule. The plaintiff's attorney shall deliver to the officer making service the original trustee summons upon which to make his return of service and a copy thereof for service upon the trustee. The trustee summons shall be served in like manner and with the same effect as other process.

No trustee summons may be served unless attachment on trustee process for a specified amount has been approved by order of the court. Except as provided in subdivision (h) of this rule, the order of approval may be entered only after notice to the defendant and hearing and upon a finding by the court that there is a reasonable likelihood that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the trustee process over and above the aggregate of any insurance, bond, or other security, and any property or credits attached by writ of attachment or by other trustee process shown by the defendant to be available to satisfy the judgment.

Trustee process shall be sought by filing with the complaint a motion for approval of attachment on trustee process. The motion shall be supported by affidavit or affidavits meeting the requirements set forth in Rule 4A(h). Except as provided in subdivision (h) of this rule, the motion and affidavit or affidavits with notice of hearing thereon shall be served upon the defendant in the manner prescribed in Rule 4 at the same time the summons and complaint are served upon him.

Any trustee process shall be served within 30 days after the date of the order approving the attachment. Promptly after the service of the trustee summons upon the trustee or trustees, a copy of the trustee summons with the officer's endorsement thereon of the date or dates of service shall be served upon the defendant in the manner provided in either Rule 4 or Rule 5.

(d) **Disclosure by Trustee; Subsequent Proceedings.** A trustee shall serve his disclosure under oath within 20 days after the service of the trustee summons upon him, unless the court otherwise directs. The proceedings after service of the trustee's disclosure shall be as provided by law. When a trustee presents himself for examination,

notice thereof shall be served upon the attorney for the plaintiff, and upon motion the court shall fix a time for the disclosure to be made. Before the disclosure is presented to the court for adjudication, there shall be minuted upon the back thereof the name of the attorney for the plaintiff, the name of the trustee with the date of the service of the summons upon him, and the docket number of the action.

(e) Adjudication and Judgment. The proceedings for adjudication on the disclosure of the trustee and for the rendition and execution of judgment and the imposition of costs shall be as provided by law.

(f) Trustee Process on Counterclaim, Cross-Claim or Third-Party Complaint. Trustee process may be used by a party bringing a counterclaim, a cross-claim, or a third-party complaint in the same manner as upon an original claim, provided that the trustee resides or, if a corporation, maintains a usual place of business, in the county where the action is pending. If the counterclaim is compulsory under Rule 13(a), the party stating it may use trustee process, even though the trustee does not reside or maintain a usual place of business in the county where the action is pending.

(g) Subsequent or Additional Trustee Process. If no trustee process has issued, or if the time period prescribed in subdivision (c) of this rule for serving trustee process has expired, the court on motion may issue an order of approval for an additional attachment on trustee process. The provisions of subdivisions (c) and (h) of this rule apply to the motion and any trustee process ordered thereunder, except that notice if appropriate shall be served upon the defendant in the manner provided in Rule 5.

(h) Ex Parte Hearings on Trustee Process. An order approving trustee process for a specified amount may be entered ex parte only in an action commenced by filing the complaint with the court together with a motion for approval of attachment on trustee process as provided in subdivision (c) of this rule. Such order shall issue if the court finds that there is a reasonable likelihood that the plaintiff will recover judgment in an amount equal to or greater than the amount of the trustee process over and above the aggregate of any insurance, bond or other security, or property or credits attached by writ of attachment or by other trustee process known or reasonably believed to be available to satisfy the judgment and that either (i) there is a clear danger that the defendant if notified in advance of the attachment on trustee process will withdraw the goods and credits from the hands and possession of the trustee and remove them from the state or conceal them, or otherwise make them unavailable to satisfy a judgment, or (ii) there is immediate danger that the defendant will dissipate the credits, or

damage or destroy the goods, to be attached on trustee process. A maximum of one hundred dollars of demand bank accounts of the defendant held by any one trustee shall, however, be exempt from trustee process approved by an ex parte order under this subdivision. The motion for an ex parte order under this subdivision shall be accompanied by a certificate by the plaintiff's attorney of the amount of any insurance, bond, or other security, and any other attachment or trustee process which he knows or has reason to believe will be available to satisfy any judgment against the defendant in the action. The motion, in the filing of which the plaintiff's attorney shall be subject to the obligations of Rule 11, shall be supported by affidavit or affidavits meeting the requirements set forth in Rule 4A(h).

(i) Dissolution or Modification of Ex Parte Trustee Process. On 2 days' notice to the plaintiff or on such shorter notice as the court may prescribe, any person having an interest in goods or credits that have been attached on trustee process pursuant to an ex parte order under subdivision (h) of this rule may appear, without thereby submitting his person to the jurisdiction of the court, and move the dissolution or modification of the trustee process, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. At such hearing the plaintiff shall have the burden of justifying any finding in the ex parte order that the moving party has challenged by affidavit. Nothing herein shall be construed to abolish or limit any means for obtaining dissolution, modification or discharge of an attachment that is otherwise available by law.

[Amended February 1, 1960; December 31, 1967; July 1, 1970; September 23, 1971; January 1, 1973; April 15, 1975; September 1, 1980; August 7, 1981; February 1, 1981.]

RULE 6. TIME

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation.

For the purpose of this subdivision legal holidays shall include days on which the Chief Justice of the Superior Court pursuant to Rule 77(c) specifically orders the clerk's office closed.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect, but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), 60(b), 73(a) and 74(a) and (*o*) except to the extent and under the conditions stated in them.

(c) Unaffected by Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action.

(d) For Motions—Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 7 days before the time specified for the hearing unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time. The notice of the hearing may be served separately from the motion.

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

[Amended effective November 1, 1966; December 31, 1967; November 1, 1969; May 15, 1974; February 1, 1984.]

RULE 7. PLEADINGS ALLOWED: FORM OF MOTIONS

(a) Pleadings. There shall be a complaint and an answer, and a disclosure under oath, if trustee process is used; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim denominated as such; a third-party complaint, if a person who was not an original party is summoned under Rule 14; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) Motions and Other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, the rule or statute invoked if the motion is brought pursuant to a rule or statute, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) Any party filing a motion, except motions for enlargement of time to act under these rules, for continuance of trial or hearing, or any motion agreed to in writing by all counsel, shall file with the motion or incorporate within said motion a memorandum of law which shall include citations and supporting authorities. A party opposing a motion shall file a memorandum in opposition to the motion not later than 7 days prior to the hearing on the motion, unless another period is fixed by order of court.

(c) Demurrers, Pleas, Etc., Abolished. Demurrers, pleas and exceptions for insufficiency of a pleading shall not be used.

(d) Pleadings in Actions Appealed From Probate Court. On an appeal to the Superior Court sitting as the Supreme Court of Probate, the appellant shall, within 34 days from the date of the proceeding appealed from, file with the clerk of the Superior Court copies, attested by the register of probate, of the reasons of appeal, the appeal bond, and the petition, account, complaint in equity or other document and the decree thereon which is the subject matter of the appeal. No other pleadings shall be required.

[Amended effective December 1, 1959; February 2, 1976; November 15, 1976; December 11, 1981; February 15, 1986.]

RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS

(a) **Motion for Order Compelling Discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party or a deponent may be made to a single justice of the Supreme Judicial Court, in an action pending before him, or to any justice of the Superior Court. On matters relating to a deposition being taken outside the state, an application for an order to the deponent may also be made to any court having general civil jurisdiction in the place where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in 30(b)(5) or 34, fails to respond that inspection will be permitted as requested or fails to produce or to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling production or inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order.

(1) *Sanctions by Court in Place Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the place in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) **Expenses on Failure to Admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) **Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or to comply with a properly served request for production under Rule 30(b)(5), without having made an objection thereto, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for production or inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

[Amended effective October 1, 1970.]

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Apportionment of Representatives in Congress

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

§ 3. Persons disqualified from holding office

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

§ 4. What public debts are void

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5. Power to enforce article

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Supreme Court, U.S.
FILED
JUL 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-6

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

—————o—————

SCOTT B. CORR, et al.,
Petitioners,

v.

SAMUEL A. HINDS,
Respondent.

—————o—————

On Petition For A Writ Of Certiorari
To The Supreme Judicial Court Of Maine

—————o—————

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

—————o—————

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TABLE OF CONTENTS

	Pages
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	5
I. The Court Below Did Not Violate Petitioners' Right To Due Process	5
A. Waiver	5
B. On The Merits, There Is No Due Process Violation	6
CONCLUSION	8
CERTIFICATE OF SERVICE	10
STATEMENT OF SERVICE	13

TABLE OF AUTHORITIES

CASES:

Pages

Ireland v. Galen, 401 A.2d 1002 (Me. 1979) 8

J.M. Clemmshaw Co. v. City of Norwich, 93 F.R.D. (D.Conn 1981) ... 6

Link v. Wabash Railroad Co., 370 U.S. 626, 632 (1962) 6,7

RULES:

Rule 34(b), Maine Rules of Civil Procedure 3

Rule 37(b), Maine Rules of Civil Procedure 7

Rule 37(d), Maine Rules of Civil Procedure 7

STATEMENT OF THE CASE

Petitioners, Scott Corr and his parents, brought the underlying action on January 22, 1985, for damages arising out of an incident of sexual abuse involving Respondent Samuel A. Hinds and Scott Corr. Petitioners then obtained an ex parte order of attachment and trustee process against two promissory notes due to respondent from the sale of this real estate business in Maine as well as against the proceeds of the sale of another parcel of real estate. On August 5, 1985, the action was placed on the expedited pre-trial list, requiring that discovery be completed by November 5, 1985. On motion of respondent, the Superior Court extended the discovery deadline to June 15, 1986.

On March 6, 1986, respondent served

interrogatories and requests for production of documents on petitioners Scott Corr, George Corr, and Patricia Corr and on March 27, 1986, respondent filed notices to take their oral depositions.[1] Respondent agreed to extend the deadline for responding to the interrogatories and to the request for production of documents to May 9, 1986. When petitioners had failed to respond by May 20, 1986, however, respondent filed a motion to compel discovery. On the morning of the hearing on respondent's motion, petitioners George and Patricia Corr

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1. Defendant took the oral deposition of plaintiffs George and Patricia Corr in New York in April, 1986. After receiving an extension of the discovery deadline, defendant took the deposition of plaintiff Scott Corr in November, 1986, in Germany, where Corr was stationed.

served respondent with their answers to interrogatories, as well as certain documents and no action was taken on the motion to compel. Petitioner Scott Corr did not serve his answers to interrogatories until the day of his deposition in November, 1986. None of the petitioners served written response to respondent's request for production as required by M.R.Civ.P. 34(b).

On May 13, 1987, respondent brought a second motion to compel and a request for sanctions, stating that as of May 18, 1987, he had received only sporadic documents and no written response to his requests for production.[2] A hearing on

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2. On July 14, 1987, unrelated to defendant's motion to compel, the Superior Court ordered plaintiffs to file the report of conference of counsel within 10 days or the case would be dismissed. The report was filed on July 29, 1987.

the second motion was held on August 7, 1987. On that date, petitioners filed a partial response to the request for production and stated that they had produced all discoverable documents in their possession.[3] Noting that no objections had ever been filed to respondent's request, the Superior Court ordered the production of all the documents requested. As a sanction for petitioners' failure to file a written response in a timely manner, the Superior Court ordered the attachment vacated.

The petitioners then sought Appellate review by the Maine Supreme Judi-

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3. On August 24, 1987, each plaintiff filed a separate formal response to defendant's request for production, again essentially stating that all documents known to exist were attached.

cial Court under the Collateral Order Doctrine. The appeal was heard in January of 1988 and the Maine Supreme Judicial Court affirmed the action of the Justice below. Petitioners then sought a Writ of Certiorari to this Court.

———————o———————

REASONS FOR DENYING THE WRIT

I. The Court Below Did Not Violate Petitioners' Right To Due Process

A. Waiver

As the Petitioners' Appendix (pages App. 1 to App. 8) clearly show, the argument they make now about lack of notice occurred to them after the Maine Superior Court Justice made his Order vacating the attachment. At the hearing on August 7, 1987, the Petitioners did not press their claim of surprise or lack of notice, or lack of ability

to prepare for the sanction requested. Thus, as the Maine Supreme Court clearly held, they did not preserve the issue (Petitioners' App. 19-20).

B. On The Merits, There Is No Due Process Violation

It is well established that the process to which one is due in regard to Court's exercising authority over its own docket and calendars depends upon the nature of the sanction applied. E.g. J.M. Clemmshaw Co. v. City of Norwich, 93 F.R.D. (D.Conn. 1981). Moreover, the adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances how such party may be taken to have of the consequences of his own conduct. Link v. Wabash Railroad Co.,

370 U.S. 626, 632 (1962). Here, the clear reading of Maine Rule of Civil Procedure 37(d) and the request in Respondent's Motion to the Court below was for the imposition of "such sanctions as are deemed just". In the State of Maine, that clearly implicates Rule 37(b), which includes as potential sanctions:

> that matters be taken as established; an order refusing to allow the disobedient party to support or oppose designated claims or defenses; an order striking pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

Clearly, then, Petitioners were put on notice that the range of sanctions for disobedience was great. Moreover, the Maine Supreme Court has held that due process is not violated in the area of

sanctions for discovery violations where the disobedient party is given an opportunity to explain its noncompliance (Ireland v. Galen, 401 A.2d 1002 (Me. 1979)), which was the case here. In addition, the Petitioners had sufficient notice to pass constitutional muster. Ireland v. Galen, supra, at 1004-5. In this case, Petitioners were notifed of the hearing and were represented. No denial of due process has been demonstrated (Opinion of the Court below reproduced at Petitioners' Brief App.-20).

———————o———————

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

DATED: July 27, 1988

Respectfully submitted,

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Attorney for Respondent

CERTIFICATE OF SERVICE

I, Mark E. Dunlap, Esquire, being first duly sworn, hereby depose and say that:

1. I am a member of the Bar of this Court.

2. I have this day filed forty (40) copies of the foregoing Brief In Opposition To Petition For A Writ Of Certiorari in the matter of Scott B. Corr, et al. v. Samuel A. Hinds (October Term, 1988, No. 88-6), now pending in the Superior Court for the County of Cumberland and State of Maine by depositing said forty (40) copies of the foregoing Brief at the United States Postal Service Post Office at Portland, Maine, first class (priority mail), postage prepaid, addressed to Joseph F. Spaniol,

Jr., Clerk, United States Supreme Court, Washington, D.C., 20543.

3. I have served three (3) copies of the foregoing Brief In Opposition To Petition For A Writ Of Certiorari in the matter of Scott B. Corr, et al. v. Samuel A. Hinds (October Term, 1988, No. 88-6), now pending in the Superior Court for the County of Cumberland and State of Maine, upon Ralph W. Brown, Esquire, attorney for the Petitioners, by depositing said three (3) copies of the foregoing Brief at the United States Postal Service Post Office at Portland, Maine, first class (priority mail), postage prepaid, addressed to him at his office at 640 Brighton Avenue, Portland, Maine, 04102.

4. I further certify that all parties required to be served have been served.

DATED: July 27, 1988

Mark E. Dunlap

STATE OF MAINE
CUMBERLAND, SS. July 27, 1988

Then personally appeared before me the above named Mark E. Dunlap, a person known to me, who made oath that the matters set forth in the foregoing Certificate of Service were true based upon his personal knowledge.

Notary Public

STATEMENT OF SERVICE

I, Mark E. Dunlap, Esquire, being first duly sworn, hereby depose and say that:

1. I am a member of the Bar of this Court.

2. I have personally placed this date forty (40) copies of the Brief In Opposition To Petition For A Writ Of Certiorari in the matter of Scott B. Corr, et al. v. Samuel A. Hinds (October Term, 1988, No. 88-6) by depositing said forty (40) copies of the foregoing Brief at the United States Postal Service Post Office at Portland, Maine, first class (priority mail), postage prepaid, addressed to Joseph F. Spaniol, Jr., Clerk, United States Supreme Court, Washington, D.C., 20543.

3. The time of filing of the Petitioners' Petition was June 28, 1988 and so I filed the responsive Brief within the time permitted by the Supreme Court Rules.

DATED: July 27, 1988

_____
Mark E. Dunlap

STATE OF MAINE
CUMBERLAND, SS. July 27, 1988

Then personally appeared before me the above named Mark E. Dunlap, a person known to me, who made oath that the matters set forth in the foregoing Statement Of Service were true based upon his personal knowledge or upon information and belief, and insofar as based upon information and belief, based

upon information which he believed to be true.

_____

Notary Public